Supreme Court, U.S.
FILED
DEC 18 2003

No. 03 900

In The

Supreme Court of the United States

THERESA VIRGINIA PIERCE,

Petitioner,

v.

CITY OF EVERGREEN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

HAS THE DEFENDANT BEEN DENIED HER FEDERAL FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT, WHERE AN IMPROPER COMMENT ON WHAT SHE WOULD SAY WAS MADE BY THE PROSECUTOR IN OPENING STATEMENTS; AND WHERE THE TRIAL COURT AGREED THAT THE COMMENT WAS IMPROPER, BUT DENIED THAT DEFENDANT'S MOTION FOR MISTRIAL; AND WHERE THE ALABAMA COURT OF CRIMINAL APPEALS AGREED THAT THE COMMENT WAS IMPROPER, BUT RULED THAT THE ERROR WAS NOT PRESERVED?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

THERESA VIRGINIA PIERCE, on behalf of herself;

CITY OF EVERGREEN, a municipal corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Theresa Virginia Pierce, respectfully requests that a Writ of Certiorari issue to review the decision issued by the Court of Criminal Appeals affirming the trial court by memorandum. The Supreme Court of Alabama denied Petitioner's petition for certiorari review.

OPINION BELOW

On April 18, 2003, the Court of Criminal Appeals of Alabama issued an unpublished memorandum in this case with a number CR-01-1993. A copy of that memorandum is attached hereto and found in the Appendix as App. 1 through App. 7.

Petitioner filed a timely application for rehearing, which was overruled on the 23rd day of May, 2003.

Petitioner timely filed a petition for certiorari review in the Supreme Court of Alabama. This petition was denied on the 19th day of September, 2003. That order is attached hereto and found in the Appendix as App. 17.

JURISDICTION

On the 19th day of September, 2003, the Supreme Court denied review of Petitioner's case. This petition is filed within ninety (90) days of that final order.

Petitioner invokes the jurisdiction of this Court pursuant to Title 28 USC Section 1257, on the grounds that her rights under the Fifth and Fourteenth Amendments

of the United States Constitution have been ignored and violated by the State courts in Alabama.

Petitioner further invokes the jurisdiction of this Court pursuant to Rule 10, 10(b) and 10(c) of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Fifth Amendment of the United States Constitution:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militaries, when in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*; nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (emphasis ours)

STATUTES INVOLVED IN THIS CASE

Code of Alabama 1975

§ 12-21-220 "Right of defendant to be witness; effect of prosecution's comment on defendant's failure to testify."

(a) "On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his

own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment."

STATEMENT OF THE CASE

The Petitioner was arrested on October 30, 1998 in the City of Evergreen, Alabama and was charged with driving under the influence of alcohol and reckless driving.

After being convicted in the municipal court, she appealed and was tried de novo by a jury in the Circuit Court of Conecuh County, Alabama.

On April 15, 2002, she was convicted and sentenced to five (5) days in the county jail without probation. She was also fined $2,000.00, plus cost. Her punishment was greatly enhanced in the circuit court. She received no jail time in the lower court and the minimum fine for first offense.

After an evidentiary hearing on her post trial motions, an appeal was perfected to the Court of Criminal Appeals of Alabama. See App. 20 through App. 22 for motion for new trial.

During opening statements, the City prosecutor made this statement:

"Mr. Watson: . . . You are going to have before you evidence that this defendant

> consumed alcohol. In fact, when she was stopped, there were, (sic) I think the evidence will show, she had a drink with her. So that's probably not going to be disputed. I don't know. I don't know what the defense will *say* about that." (emphasis ours)

The Petitioner's attorney immediately objected and before he could finish, the judge sent the jury out for a lengthy time.

It was at this time that the Petitioner first raised the constitutional question by moving for a mistrial because of the violation of Mrs. Pierce's 5th Amendment right. See Appendix for excerpts from the record and the complete colloquy. (App. 8 through App. 16)

The trial court continued to waste time and finally requested Mrs. Pierce's attorney to write out a curative charge.

The trial court ultimately attempted to give a curative charge. After the deficient charge, the following occurred:

> "Mr. Harden: Thank you sir, for trying. But because of the time lapse and the crucial nature of the error, we renew our motion for mistrial."

Petitioner also raised the constitutional question in her motion for new trial. CR-41 through CR-44 (Also see App. 20 through App. 22)

The constitutional question was next raised in the Court of Criminal Appeals in the original brief citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14

L. Ed. 2d 106 (1965). Throughout the argument on appeal, Petitioner attempted to point out that her right to remain silent had been violated. (See memorandum in the Appendix at App. 1 through App. 7)

The constitutional right to remain silent was also argued and set out in the petition and brief to the Supreme Court of Alabama.

Page 27 of the Petitioner's brief is found in the Appendix at App. 23 through App. 24.

On page 3 of petition for certiorari review, the following:

> "The prosecution made an improper comment about the defendant's right not to testify. The motion [mistrial] was renewed properly. The error was also brought to the court's attention on a motion for new trial."

Also see pages App. 18 and App. 19 of the Appendix for excerpt from Petitioner's brief at pages 6 and 23.

Petitioner also cited *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), in her argument in support of Certiorari review.

ARGUMENT

(A) ***The Supreme Court of Alabama and the Court of Criminal Appeals of Alabama has failed to follow this Court's decisions, which are relevant to the issue in this case.*** (Rule 10(c) of the Supreme Court of the United States)

In *Griffin v. California*, 380 U.S. 609, 613, 85 S. Ct. 1229, 1232 (1965), this Court citing *Mallory v. Hogan*, 378 U.S. 1, 11, 84 S. Ct. 1489, 1495 (1964) held:

> " . . . The Fifth Amendment, in its direct application to the Federal Government and in its hearing on the State by reason of the Fourteenth Amendment, forbids either *comment by the prosecution on the accused's silence* or instruction by the court that such silence is evidence of guilt." (emphasis ours)

Both the trial court and the Court of Criminal Appeals agreed that the prosecution had made an improper comment on the defendant's Fifth Amendment rights.

The trial court clearly recognized the constitutional infringement by the prosecutor.

From the record:

> "The Court: I understand, and had there only been two people out there, the defendant and Mr. Wright, ***I would have to grant that motion.***" (emphasis ours) R-9 App. 10

The trial court was, at that time, well informed that the prosecution only had one witness. (Officer Wright)

Further from the record:

> "Mr. Watson: Judge, I simply stated that I thought it would be undisputed.
>
> The Court: But the problem is from the constitutional standpoint that the only person who can dispute a fact is the defendant. ***If you make that statement you are commenting***

> ***on the defendant's failure to testify.***" R-10 (emphasis ours) (Appendix at page App. 10)

The Appellate Court also agreed that the comment was improper, but failed to apply precedent of this Court. That court stated in their memorandum:

> "Here the comment was improper because the appellant was the only person who could have contradicted Officer Wright's testimony regarding the glass found in her car." (Appendix at App. 4)

The Appellate Court then incorrectly stated that the trial court promptly made a curative charge! Not so!

The record clearly shows that the jury was removed from the courtroom for a fatal length of time!

The long and short of what happened to Theresa Pierce, the defendant, your Petitioner, is that the trial court and the intermediate appellate court skirted the issue – a very crucial constitutional right of Pierce! After all, this was only a first time offender who had only received five (5) days in jail!

Now, look at what the Court of Criminal Appeals of Alabama did:

(a) Appellate counsel failed to properly raise the issue on appeal.

Again, not so!

Not only did Pierce move for a mistrial – but the same was renewed properly.

The Court of Criminal Appeals of Alabama stated in their memorandum ***INCORRECTLY***:

> "This court will not consider an argument that is raised for the first time on appeal."

We must therefore ask this Court to look to what the Supreme Court of Alabama has said in the context of Pierce's attempt to secure her rights to be protected against infringement by the prosecutor.

Look at what the Appellate Court ignored!

In *Ex parte Marek*, 556 So.2d 375, 378 (Ala. 1989), the Supreme Court of Alabama held:

> "If a litigant points out an alleged error and asks for such drastic relief as a mistrial, then the litigant is certainly 'objecting' to the question or line of questioning." . . . "In those circumstances, when a litigant makes a motion for mistrial immediately after the questions are asked that are the grounds made the basis of the motion for mistrial, and the grounds for the motion are clear and definite, then the motion for mistrial will ***preserve for review lesser prayers for relief***, such as an objection or motion to strike. We make this holding because, as we stated earlier, a litigant who requests such drastic relief as a mistrial *implicitly* requests lesser relief that is proper in case the greater relief is denied or is found to be improper . . . " (emphasis ours)

In other words, we have a case where the trial court and the Court of Criminal Appeals of Alabama says Okay Pierce, your basic fundamental constitutional rights have been deprived – but you didn't object. Clearly not the case!

Not only did the Appellate Court ignore precedent from this Court, but they also failed to follow Alabama's precedent. *Ex parte Marek (supra)*, clearly at page 378 of

the opinion shows that Petitioner did all that was required!

(B) ***Another basis for granting this petition is that Alabama's court of last resort has decided an important federal question in a way that conflicts with a decision of the Eleventh Circuit Court of Appeals.*** (Rule 10(b) of the Rules of the Supreme Court of the United States)

In *United States v. Griggs*, 735 F. 2d 1318, 1323 (11th Cir. 1984), the Eleventh Circuit Court of Appeals held:

> "After careful consideration, we conclude that the phrase ***'the defendant has not testified about it'*** is an unmistakable reference to Grigg's exercise of his Fifth Amendment privilege. The jury could not have failed to comprehend the remark in any other way. Because this statement infringes on Grigg's constitutional rights we must reverse his conviction." (emphasis ours)

In *Griggs (supra)*, the Court discussed another Eleventh Circuit case which established a two prong test to evaluate improper comments.

In *United States v. Stuart-Caballero*, 686 F. 2d 890, 892 (11th Cir. 1982), the Eleventh Circuit citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) held:

> "It is clear that a prosecutor may not comment on a defendant's exercise of his right ***not*** to testify at his trial. *Griffin (supra)*. In this circuit, improper prosecutoral comment may be established by showing that: (1) the prosecutor manifestly intended to, comment on the defendant's silence, or (2) the character of the comment was such that a

> jury would naturally and necessarily construe it as a comment on the defendant's silence." (emphasis ours)

We do not argue or suggest that the first prong applies in the case sub judice. However, there can be no mistake that the jury would 'naturally and necessarily' construe it as a comment on the defendant's silence!

The trial court and the Court of Criminal Appeals ***clearly*** stated that it was an improper comment! Therefore, we say that the second prong applies in Pierce's case.

The error is enhanced when we look at the state of the proceedings in which the error was committed. The improper comment was made in the opening statement! It is therefore more damaging than if it had been made during closing arguments.

In *Ex parte Purser,* 607 So.2d 301, 302 (Ala. 1992), the Supreme Court of Alabama held:

> "We note initially that the fact that the comment occurred during opening statements, rather than during closing arguments, does not prevent the remark from being a comment on the defendant's failure to testify. The Court of Criminal Appeals properly quoted the following from an opinion by Judge Harris from that court: 'It does not matter that during the opening statement the accused has or has not taken the stand, his constitutional right to remain silent may still be violated. *The argument that no harm can be ascertained from remarks indifferent to that right until closing arguments after the accused has elected not to testify is ill conceived and ill thought out.* Certainly, we would be remiss in our duty if we failed to recognize the danger of the district attorney, early in the proceedings *directly* or *indirectly* focusing the

> jury's attention on what the accused will or will not testify to, or on what he previously has or has not admitted. ***In many instances, if this tactic were allowed, the prejudice to the accused would be even greater than if the comment were made after all the testimony had been taken.*** If permitted, the jury would be on their constant guard anticipating the accused's chance to tell his story! This form of prejudice to an accused's right to receive a fair trial will not be sanctioned or tolerated by this court. . . . '" (emphasis added)

We hope that this Court will also take the position as stated above by the Supreme Court of Alabama, not to "sanction" or "tolerate" the error contained in this case!

CONCLUSION

In wrapping up and winding down, we hope that this Court will sanction this 'weary old country' lawyer one unorthodox and eccentric deviation from protocol.

When presented with a request to stay execution of sentence until we could petition our United States Supreme Court, the Honorable Sam Welch stated sardonically, "I can just see the United States Supreme Court hearing a lowly misdemeanor DUI from Conecuh County, Alabama."[1]

[1] This statement does not appear in any record in this case.

This is not a murder case; not a rape case; not even a felony case! But this case is as important to your Petitioner as any of the more serious cases. She was entitled to her day in court without her basic fundamental rights deprived from her! She did not get what the United States Constitution guaranteed to her.

The trial court and her courts of last resort in the State failed her. She has a right to be tried by a jury of her peers, error free. She has a right to testify or not testify. This is her right without comment by the prosecution!

We therefore humbly, modestly but very sincerely, pray that this Court will grant Theresa's Petition for Writ of Certiorari and review the errors that we respectfully submit to your care!

Respectfully submitted,

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Attorney for Petitioner

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MEMORANDUM

CR-01-1933 Conecuh Circuit Court CC-01-77

Theresa Virginia Pierce v. City of Evergreen

McMILLAN, Presiding Judge.

The appellant was found guilty of driving under the influence of alcohol. The circuit court ordered her to serve 5 days in the county jail and suspended her driver's license. The court also ordered the appellant to attend CRO school and pay a $2,000 fine, a crime victims assessment and costs.

Evidence at trial tended to show that on October 30, 1998, Officer Artie Wright observed the appellant driving 53 miles per hour in a 40 mile-per-hour zone. He followed her and saw her repeatedly weave across the center line. Wright activated his lights, and the appellant stopped. When he approached the car, Wright smelled the odor of alcohol. He also saw a drinking glass inside the car which contained a clear liquid with an alcoholic smell. The appellant had difficulty getting out of the car, her speech

was slurred, and she failed all of the field sobriety tests that Officer Wright administered. In Wright's opinion, the appellant was under the influence of alcohol. He placed her under arrest and took her to the city hall, where she refused to complete chemical breath tests. The appellant did not call any witnesses or testify at trial.

I.

The appellant contends that the trial court erred in refusing to grant her first motion for mistrial. She argues that the prosecutor made an improper comment in opening statement about her failure to testify and that, instead of giving an immediate and appropriate curative instruction, the court sent the jury out of the courtroom. She argues that, although the judge later gave a curative instruction, the instruction was insufficient because of the lapse of time and the judge's failure to point out the prosecutor's improper comment.

The record reveals the following comments during the prosecutor's opening remarks:

> " . . . You are going to have before you evidence that this defendant consumed alcohol. In fact, when she was stopped, there were, [sic] I think the evidence will show, she had a drink with her. So that's probably not going to be disputed. I don't know. I don't know what the defense will say about that."

The defense counsel asked to approach the bench, and the judge sent the jury out of the courtroom because he "knew that we were going to have a long discussion about this matter." The judge asked if there had been anyone other than the defendant and the arresting officer present

at the scene, and the prosecutor stated that another officer had been present but would not be available to testify. The judge then stated that, if only one officer testified, the prosecutor's comment could be construed as an indirect reference to the defendant's failure to testify. He stated that he would prefer not to mention the comment to the jury because he did not believe that they would have interpreted it the way the defense counsel had. The counsel again asked for a curative instruction, and the judge told him to state or write down the charge that he wanted and the court would give it. The counsel then asked the judge to instruct the jury "that if the opening statement suggested anything about the defense putting on a charge – or putting on a defense – that [the defendant] has absolutely the right not to." He also asked the judge to charge "that she's got a right to testify or not testify." The court gave lengthy corrective instructions which included the following:

> " . . . [T]he defendant does not have to present any evidence whatsoever, nor even cross-examine a witness, nor testify herself in this trial. . . .
>
> "And this Constitution of the United States guarantees to each defendant the absolute right to determine whether or not that defendant would testify or not testify.
>
> "Now, if the defendant were to choose not to testify, then that would be her perfect right. And you're instructed that if that were the case that would be a fact from which you could draw no inference. It would be not considered by you as a fact in the defendant's favor, nor would it be laid to the defendant's detriment. You may not draw

> co[nc]lusions of any sort if a defendant fails to testify."

After the court completed the instructions, the defense counsel renewed his motion for mistrial "because of the time lapse and the crucial nature of the error." The court again denied the motion.

The general rule is that the State may not call attention to the defendant's failure to testify but may point out the defense's failure to produce other evidence that might be helpful to the defendant. *Robinson v. State*, 352 So. 2d 11 (Ala. Crim. App. 1977). However, when the prosecutor remarks that evidence offered by the State is uncontradicted and the defendant is the only person who could or would have contradicted the evidence, it is generally held that the comment refers to the defendant's failure to testify and is thus improper. *Id.* Error resulting from the prosecutor's improper comment as to the defendant's failure to testify may be cured by prompt instructions by the trial court. *Christian v. State*, 502 So. 2d 868 (Ala. Crim. App. 1986).

Here, the comment was improper because the appellant was the only person who could have contradicted Officer Wright's testimony regarding the glass found in her car. However, the error could be cured because the trial court instructed the jury regarding the comment immediately after the parties concluded their arguments and the jurors returned to the courtroom. Excusing the jury during the arguments took no more time than conducting the same arguments at the bench, and the alleged "delay" was simply a fair opportunity for the parties to be heard.

In reviewing the sufficiency of the trial court's instructions, this court will consider the circumstances of each case on its own, considering the type of remark, whether reply in kind or not, whether promptly objected to, and the appropriateness of the judge's instructions. *Whitt v. State*, 370 So. 2d 736 (Ala. 1979). In *Travis v. State*, 776 So. 2d 819, 853 (Ala. Crim. App. 1997), this court stated:

> "[A]t a minimum, the trial judge must sustain the objection and should then promptly and vigorously give appropriate instructions to the jury. Such instructions should include that such remarks were improper and to disregard them; that statements of counsel are not evidence, that under the law the defendant has the privilege to testify in his own behalf or not; that he cannot be compelled to testify against himself; and, that no presumption of guilt or inference of any kind should be drawn from his failure to testify. (Citations omitted)."

Here, the trial court promptly gave both of the instructions requested by the appellant. Although the court did not specifically state that the prosecutor's comments were improper, the appellant did not request such an instruction or object to this omission at trial. This court will not consider an argument that is raised for the first time on appeal. *Eastland v. State*, 677 So. 2d 1275 (Ala. Crim. App. 1996).

II.

The appellant also contends that the trial court erred in refusing to grant a mistrial when a polled juror stated that he had not agreed to the verdict of guilty. She argues

that the trial court sent the jurors back to continue deliberations without a proper instruction and that, because the court told the jury that the verdict "has" to be the verdict of "all 12," the court crossed the line and coerced the single juror to return a guilty verdict. She argues that the judge should have told the jury that they "should not give up any beliefs or convictions unless they could do so free from thinking that his statement was an order."

During the jury poll, one juror apparently nodded "no" when the court asked, "Is this your verdict, sir?" The court then asked, "Are you saying that you did not agree with that verdict?" and the juror responded, "Not completely, no." The appellant moved for mistrial, and the trial court denied the motion. The court then instructed the jury:

> "All right. Ladies and gentlemen, the verdict has to be the verdict of all twelve jurors. And that being the case, I've just had an indication that it was not unanimous. That being the case, I'm going to give you both verdict forms back and ask you to continue deliberating."

The court sent the jury out to deliberate, and the appellant, citing *Ex parte Morris*, 465 So. 2d 1180 (Ala. 1985), renewed his motion for mistrial. The court again denied the motion, noting that the instructions to the jury had been innocuous and that the court had returned both verdict forms and had not encouraged a particular verdict. The court stated that it had no additional instruction to give "unless it's requested by either side." The appellant did not request any further instruction by the court.

The appellant's first motion cannot be considered because she did not ask the court to order further deliberations before she made the motion. Section 12-16-15,

Ala. Code 1975, provides that, if any juror indicates during a jury poll that the verdict is not that of the jury, they "must be sent out for further deliberations." Because of the mandatory language of § 12-16-15, a request for further deliberations is a condition precedent to a request for a mistrial. *Rahman v. State*, 510 So. 2d 279 (Ala. Crim. App. 1987).

The appellant's second motion also was properly denied. In *Ex parte Morris*, supra, a mistrial was warranted because the trial court repeatedly ordered the jury to continue deliberations and set a deadline for them to return with a unanimous verdict. No such actions occurred in the present case. Furthermore, the trial court did not err by failing to instruct the jurors that they were not being ordered to give up any beliefs or convictions. The appellant did not request such an instruction at trial. This court will not consider an argument that is raised for the first time on appeal. *Eastland v. State*, supra.

AFFIRMED.

Cobb, Baschab, Shaw, and Wise, JJ., concur.

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE
COUNTY OF CONECUH

THIRTY-FIFTH JUDICIAL CIRCUIT

CRIMINAL

THE STATE OF ALABAMA,

v.

THERESA VIRGINIA PIERCE
Defendant.

Nos. CC-01-76,
CC-01-77

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

(Filed Aug. 7, 2002)

Before:

Hon. Samuel H. Welch, Jr. (and jury)

Evergreen, Alabama – Thursday,

April 18, 2002, 2:13 p.m.

* * *

[7] You are going to have before you evidence that this defendant consumed alcohol. In fact, when she was stopped, there were, I think the evidence will show, she had a drink with her. So that's probably not going to be disputed. I don't know. I don't know what the defense will say about that.

You'll also hear evidence of –

MR. HARDEN: Judge, if it please the Court, may we approach?

THE COURT: Ladies and gentlemen, I have something to take up outside of your presence. And if you don't mind, I'd appreciate y'all going back to the small jury room. It won't take very long.

(Whereupon, the jury left the courtroom, after which the [8] following proceedings were had:)

THE COURT: First of all, how many people were on the scene when she was stopped?

MR. WATSON: Two, I guess.

THE COURT: That would be Officer Wright and the defendant?

MR. WATSON: I think there may have been one more.

OFFICER WRIGHT: There was another one, Your Honor. If memory serves me correctly, I mean, if the other officer that was there, he's no longer with the department.

THE COURT: Okay. So we have another possible witness to this who is not the defendant.

Go ahead and make your motion.

MR. HARDEN: Judge, if it please the Court and to save time, which is very important, we would move for mistrial based upon the prosecution's improper comment on Ms. Pierce's right under the Fifth Amendment. It was an improper [9] comment on what the defendant's evidence would show and what it implied that she would testify. And we, respectfully, move for a mistrial.

THE COURT: I understand. And had there only been two people out there, the defendant and Mr. Wright, I would have to grant that motion.

But now I assume that the evidence is going to show and be brought out during the course of the trial, that there was another person out there who would be able to dispute that fact if that person testified.

MR. HARDEN: But if it please Your Honor, we have been informed that the prosecution is only going to call one witness.

THE COURT: Well, I haven't been informed of that.

MR. WATSON: I tell you, Judge, that's what we plan to do.

THE COURT: I understand that. But there was no direct reference to the defendant.

[10] MR. HARDEN: Judge, it was implied. And we are dealing with that most basic fundamental constitutional right, which is the Fifth Amendment. Not only does the Fifth Amendment prohibit that, the Alabama Code prohibits comments on defendant's right.

MR. WATSON: Judge, I simply stated that I thought it would be undisputed.

THE COURT: But the problem is from the Constitutional standpoint, that the only person who can dispute a fact is the defendant. If you make that statement, you are commenting on the defendants failure to testify.

And so that's why the first question out of my mouth was, was there somebody else besides those two people. Since there was somebody else, then I don't believe it's a fatal error. I'll be glad to charge the jury if you feel like I can charge them and eradicate any problem you've got.

But he also did not refer to the defendant. He said, "the defense." And [11] at this point, the jury well knows the defense is going to come up and have a chance to argue the case. And –

MR. HARDEN: But if it please the Court –

THE COURT: – and on cross-examination, you might well establish that Mr. Wright – I'm sorry, Officer Wright – was mistaken about whether or not there was a drink. He's only talking about what he expects the evidence to show.

MR. HARDEN: But the point is, Judge, the defendant does not have to put on any defense.

THE COURT: I know that.

MR. HARDEN: The defendant is under no obligation.

THE COURT: I know that.

MR. HARDEN: Would you, sir, rule on my motion for mistrial.

THE COURT: I have denied it.

MR. HARDEN: Okay. And would you then attempt to eradicate –

THE COURT: Okay. I will let you [12] write out what you think I ought to say.

MR. HARDEN: No, sir. I frankly don't think that it can be eradicated. But I would ask that you attempt to do so, sir.

THE COURT: The way I'm going to do a jury charge, if you choose to ask me to do a jury charge, is let you draft it, and let me look over the jury charge. And if I agree with your draft, I'll be glad to give that one.

MR. HARDEN: If it please the Court –

THE COURT: I don't believe that the jury has been tainted at this point. And I would prefer not to even mention it because I don't believe they would have interpreted it in the way that you are, because you are very sensitive to this kind of thing, as well you should be, as was I.

You noticed the first thing I did was send the jury out because I knew we were going to have a long discussion about this matter.

[13] MR. HARDEN: That is a problem in itself, Judge, because the law is, and it's clear, that any attempt to eradicate the jury's mind has got to be spontaneous, it's got to be quick. And even though there has been a fatal lapse in time, from the standpoint of guaranteeing this lady her constitutional rights, we are again asking you, as a seasoned circuit judge, to attempt to eradicate it, sir.

THE COURT: As a seasoned circuit judge, I think I know that if I get you to write the charge, I'm

okay. And if I don't and I make a mistake, I get reversed.

Now, what – I will do this for you, for what it's worth: I'll ask the court reporter if she was taking down opening statements when this was happening.

MR. HARDEN: Yes, sir, she was.

THE COURT: That's normally your habit, even though you don't have to do it. And I commend the court reporter for doing so, so I don't have to restate [14] what was said in opening charge.

MR. HARDEN: She has every bit of it, Judge.

THE COURT: Okay. If you wish for me to give a charge, I will let you tell me what you think that charge ought to be or write it down, and I'll be glad to consider it.

MR. HARDEN: Then it's going to take me quite a while to write out what I would expect Your Honor to say.

THE COURT: Off the record.

(Whereupon, an off-the-record discussion was held.)

(Whereupon, the proceedings resumed, after which the following proceedings were had:)

MR. HARDEN: Judge, I would ask that you, again, charge the jury that if the opening statement suggested anything about the defense putting on a charge – or putting on a defense – that she has absolutely the right not to.

THE COURT: Actually, I think that [15] would be a good charge. And I will be glad to give something along those lines.

MR. HARDEN: And that she's got a right to testify or not testify and attempt to expunge it as error.

And if it please the Court, I still urge you to consider the time that has elapsed between the error and –

THE COURT: I don't think we've talked more than seven minutes.

MR. HARDEN: If we feel comfortable, we won't approach the bench. But if we don't feel comfortable, instead of sending them back out, if we want to renew our motion, we'll approach the bench.

THE COURT: I'll be glad to do that. All right. If you would bring the jury back in.

(Whereupon, the jury returned to the courtroom, after which the following proceedings were had:)

[16] **JURY CHARGE**

THE COURT: Ladies and gentlemen, let me state to you that the purpose of opening argument is to allow each side to give you a preview, a statement of what they expect the evidence to show. And I'll point out the defendant, for her plea and in answer to the solicitor's complaints, has said that she is not guilty.

And this places upon the prosecution the burden of proving her guilt beyond a reasonable doubt. The burden never rests upon the defendant to establish her

innocence nor to disprove the facts tending to establish her guilt.

And I instruct you that the defendant is presumed to be innocent, and the presumption that she is innocent remains throughout the course of the trial until each and every juror is convinced from the evidence that the defendant is guilty beyond a reasonable doubt.

This presumption of innocence is to [17] be regarded by you as a matter of evidence. It's a benefit to which the defendant is entitled. And only until and unless you are convinced from the evidence the defendant would be guilty beyond a reasonable doubt, only at that time does the presumption that she is innocence [sic] leave her.

Now, what this means is: That the defendant does not have to present any evidence whatsoever, nor even cross-examine a witness, nor testify herself in this trial. And you could still find her not guilty if the State had failed to prove their case beyond a reasonable doubt.

And this Constitution of the United States guarantees to each defendant the absolute right to determine whether or not that defendant would testify or not to testify.

Now, if the defendant were to choose not to testify, then that would be her perfect right. And you're instructed that if that were the case that would be [18] a fact from which you could draw no inference. It would not be considered by you as a fact in the defendant's favor, nor would it be laid to the defendant's detriment. You may not draw collusions of any sort if a defendant fails to testify.

Now, ladies and gentlemen, at this point, I'll allow the attorneys to make any additional motions they need to.

(Whereupon, the following proceedings were had at the bench by Court and counsel out of the hearing of the jury:)

MR. HARDEN: Thank you, sir, for trying. But because of the time lapse and the crucial nature of the error, we renew our motion for a mistrial.

THE COURT: Okay. I'll overrule.

(Whereupon, the following proceedings continued within the hearing of the jury:)

THE COURT: Thank you very much.

And we'll resume with the opening argument.

* * *

IN THE SUPREME COURT OF ALABAMA

(LOGO)

September 19, 2003

1021488

Ex parte Theresa Virginia Pierce. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Theresa Virginia Pierce v. City of Evergreen) (Conecuh Circuit Court: CC-01-77, Criminal Appeals: CR-01-1933).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COST TAXED TO PETITIONER.

Writ Denied – No Opinion

BROWN, J. – See, Lyons, Harwood, and Stuart, JJ., concur.

SUPREME COURT CASE NUMBER: 1021488

IN THE SUPREME COURT OF ALABAMA

THERESA VIRGINIA PIERCE

PETITIONER

VS.

STATE OF ALABAMA

RESPONDENT

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

OF

PAUL M. HARDEN, SR.
ATTORNEY FOR PETITIONER
THERESA VIRGINIA PIERCE

* * *

In other words, the trial court was given proper and sufficient opportunity to correct his error without the Defendant having to ask this Court to protect her rights under the 5th and 14th Amendment of the United States Constitution and Article I § 6 of the Alabama Constitution [Right not to be a witness . . .]

* * *

STATEMENT OF ISSUES

I. WHEN THE PROSECUTION MAKES AN IMPROPER COMMENT ABOUT WHAT THE DEFENSE WILL SAY ABOUT THE EVIDENCE, AND WHERE THE COMMENT IS MADE IN THE OPENING STATEMENT, IS THE DEFENDANT ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT DENIES A MOTION FOR MISTRIAL AND FAILS TO GIVE A PROMPT, IMMEDIATE AND APPROPRIATE CURATIVE CHARGE?

II. WHETHER A MOTION FOR MISTRIAL MADE AFTER THE PROSECUTION IMPROPERLY COMMENTED ON THE DEFENDANT'S RIGHT TO REMAIN SILENT PRESERVES THE ERROR FOR APPELLANT REVIEW?

* * *

IN THE CIRCUIT COURT OF CONECUH COUNTY, ALABAMA

CITY OF EVERGREEN,	)	
PLAINTIFF,	)	**CASE NO.** CC-01-077
VS.	)	**EVIDENTIARY HEARING REQUESTED**
THERESA PIERCE,	)	
DEFENDANT.	)	

MOTION FOR A NEW TRIAL

(Filed May 7, 2002)

Comes now the Defendant, Theresa Pierce, by and through her attorney of record, and moves this Court to set aside the verdict of the jury in this cause, and grant unto the Defendant a new trial on the following grounds separately and severally:

1. That this Court erred in enhancing the Defendant's punishment without any showing that there were intervening circumstances justifying a more severe sentence in the Circuit Court.

2. That the effect of this Court's action has served to punish the Defendant for exercising her right to appeal.

3. The only punishment that was imposed on the Defendant in the Municipal Court for the City of Evergreen was a fine of $900.00, plus costs of $242.50, and a further order that she see the Court Referral Officer. There was no jail time imposed, nor, was there any other assessment.

4. That this Court has denied the Defendant her rights to equal protection of the law as well as due process

as guaranteed to her by *Article 1, Section 6 of the Alabama Constitution, also known as the Alabama Declaration of Rights, as well as the 14th Amendment to the United States Constitution.*

5. In addition to those constitutional provisions above, the Defendant has also been

* * *

failed to respond that they had been victims of crimes when in fact they had been.

16. The Court erred by failing to grant Defendant a mistrial when the prosecution made improper comments on what the defense would prove.

17. The Trial Court failed to TIMELY attempt to eradicate the comment from the juries mind, said comment being the same as set out in paragraph 17 above.

18. The Trial Court erred by failing to grant Defendant's mistrial when the jury returned a verdict of guilty which was not unanimous.

19. The Trial Court's conduct in sending the jury back for further deliberations after one (1) juror admitted that the verdict of guilty was not his verdict, had the effect to coerce the lone juror to surrender his beliefs.

20. That if the Court fails to grant this Motion for the reasons set out above, the Defendant, Theresa Pierce, will further be deprived of her rights under the *5th, 6th and 14th Amendment* of the *United States Constitution,* and *Article 1, Section 6* of the *Constitution of Alabama of 1901,* also known as the *Alabama Declaration of Rights.*

WHEREFORE, premises considered, the Defendant, Theresa Pierce, respectfully requests the Court to grant this Motion and order her a new trial.

HARDEN & HARDEN, L.L.C.
Attorneys for Defendant

/s/ Paul M. Harden, Sr.
PAUL M. HARDEN, SR.
Post Office Box 985
Monroeville, Alabama 36461
(251) 743-3176

The Defendant, Theresa Pierce, respectfully requests an evidentiary hearing on said Motion.

/s/ Paul M. Harden, Sr.
PAUL M. HARDEN, SR.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2002, I served a copy of the foregoing Motion For New Trial, on the Honorable Todd Watson, by placing the same in the United States mail, first class postage, prepaid and addressed as follows:

Honorable Todd Watson
Post Office Box 310
Evergreen, Alabama 36401

/s/ Paul M. Harden, Sr.
PAUL M. HARDEN, SR.

IN THE SUPREME COURT OF ALABAMA

THERESA VIRGINIA PIERCE,

Petitioner

vs.

STATE OF ALABAMA

Respondent

APPEALED FROM THE CIRCUIT COURT
OF CONECUH COUNTY, ALABAMA
(CASE NO: CC-01-77)

PETITION FOR WRIT OF CERTIORARI

AND

VERIFIED STATEMENT OF FACTS PURSUANT TO RULE 39, 39(d)(5), 39(d)(5)(A), 39(k) AND 40(e) OF THE ALABAMA RULES OF APPELLATE PROCEDURE

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* * *

> "*MAREK*" [556 So.2d 375 (Ala.1989)] "indicates that a motion for mistrial compensates for the lack of an objection or motion to strike as long as the motion for mistrial follows immediately after the offending question.
>
> There is **no requirement** that in making a motion for mistrial, defense counsel include a request for instructions to disregard." (emphasis ours)

The 39(d)(5)(A), 39(k) and 40(e) motion for statement of facts which follows, will clearly show that a timely

mistrial motion was made by the defendant. The prosecution made an improper comment about the defendant's right not to testify. The motion was renewed properly. The error was also brought to the court's attention on a motion for new trial.

* * *